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24553-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

BEE XIONG, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

BRIEF OF APPELLANT

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SUPREME COURT CASES

I.

ASSIGNMENTS OF ERROR

(1) The trial court erred in entering Finding of Fact no. 6.[1]

(2) The trial court erred in entering its conclusion of law.

II.

ISSUES PRESENTED

(1) May police officers serving an arrest warrant detain and frisk an individual they believe is the man sought in the warrant while they check out his claim that he is not the person in question?

(2) Does the presence of a hard object in a detainee's pocket justify an officer's decision to confirm or dispel suspicion that the object might be a weapon?

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[1] A copy of the Findings of Fact, Conclusions of Law is attached as Appendix A. CP 16-22.

III.

STATEMENT OF THE CASE

Respondent/defendant Bee Xiong was charged in the Spokane County Superior Court with possession of methamphetamine with intent to deliver. CP 1. The evidence was found while officers, attempting to serve a federal arrest warrant for Kheng Xiong, seized the defendant in the mistaken belief he was his brother. Removal of a hard object, a drug pipe, from the defendant's pocket, led to his arrest for possession of a controlled substance. Additional quantities of methamphetamine were found in a search incident to that arrest. CP 2-3.

Defendant moved to suppress, challenging the legality of the seizure and the frisk. CP 4-7, 11-15. The prosecutor opposed the motion, arguing that the defendant's actions justified the frisk. CP 8-10.

The matter proceeded to hearing before the Honorable Jerome Leveque. RP 1 *et seq.* ATF agent William Ramsey testified that he was part of a joint task force that was looking to serve a federal arrest warrant for Kheng Xiong. Five officers went to his residence. They had a picture of Kheng Xiong with them. RP 4-7. One officer spotted the defendant in the front seat of a mini-van and identified him to the other officers as Kheng Xiong. Defendant was seized when he left the mini-van and agent Ramsey immediately handcuffed him. RP 6-7.

When asked who he was, the defendant told Ramsey he was Bee Xiong. RP 7. Defendant did not have any identification on him. RP 7-8. Officers began trying to find identifying information about Bee Xiong to determine if he might be the man in custody. RP 8, 10. Ramsey saw a bulge in defendant's right front pants pocket. The officer touched the object and defendant "had a fairly dramatic reaction" and pulled away. RP 8.

Defendant declined to let Ramsey search the pocket; the agent touched it again to confirm that it was a hard object. RP 12. Ramsey feared it was a small gun or other weapon. RP 14. The other officers told Ramsey to seize the item and he pulled out what turned out to be a glass pipe that was wrapped up. RP 12. At that point defendant was arrested for possessing a controlled substance due to residue spotted in the pipe. A further search turned up a small plastic scale, cash, and two containers containing methamphetamine. RP 13. Shortly thereafter the defendant's mother pulled up and identified him as Bee Xiong. RP 14.

Sgt. David McCabe of the Spokane Police Department was the other witness at the hearing. RP 22-28. While he was not immediately concerned with the defendant accessing a weapon, the officers would have to deal with the issue before taking the defendant's handcuffs off. McCabe therefore directed Ramsey to remove the item from defendant's

pocket. RP 25. McCabe was the one who processed the evidence found by Ramsey. RP 26.

The parties argued the validity of the pocket search to Judge Leveque. RP 28 *et seq*. Judge Leveque concluded that the seizure and handcuffing were appropriate. RP 42. He did not believe that the officers articulated a showing that defendant was armed and dangerous at the time his pocket was checked. RP 44. He therefore ordered the evidence suppressed. RP 44.

Written findings in support of the ruling and an order terminating the case were filed shortly thereafter. CP 16-24. This appeal timely followed. CP 25-31.

IV.

ARGUMENT

A. THERE WAS AN ARTICULABLE BASIS FOR SEIZING THE HARD OBJECT IN DEFENDANT'S POCKET.

The officers' mistaken seizure of the defendant was still constitutionally valid and they could have searched incident to that arrest. The decision to first check out defendant's claim of mistaken identity should not be held against them. Nonetheless, agent Ramsey did articulate

the basis for seizing the hard object in the pocket. The trial court's suppression ruling should be reversed.

The defendant did not seriously challenge the validity of his seizure. Washington law is in accord with the federal cases on this point. A mistake of *fact* does not invalidate an arrest; a mistake of *law* will. Thus, our courts have recognized that police, having probable cause to arrest a person, can validly arrest the wrong person in a case of mistaken identity. *E.g.*, State v. Smith, 102 Wn.2d 449, 453-454, 688 P.2d 146 (1984), *citing* Hill v. California, 401 U.S. 797, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971). *Accord,* State v. Seagull, 95 Wn.2d 898, 906-908, 632 P.2d 44 (1981) [officer's mistaken identification of tomato as marijuana still supplied probable cause]. A mistake of fact simply does not invalidate an arrest for which probable cause exists.

The officers could have searched the defendant incident to his mistaken identity arrest. Instead, they chose to forego a whole blown arrest in order to verify the defendant's identity. If they had acted with less regard for the defendant's claims, there would be no issue but that the search was valid incident to the arrest. It is silly to punish them for their consideration. Probable cause having existed for the arrest of the defendant, the limited frisk of the pocket should be valid.

Even if it is adjudged under the standards for a seizure lacking probable cause, as the trial court did, the pocket check should still be considered valid. The law governing investigative stops is well settled. The Washington Supreme Court has determined that an investigative stop, sanctioned by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), is valid under the Washington constitution. State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986). Kennedy authorized the stop of a vehicle to investigate a crime if the officer has articulable suspicion of criminal conduct. That standard was defined as "a substantial possibility that criminal conduct has occurred or is about to occur." Id. at 6. In Kennedy, the officer's belief, based on facts articulated by the officer, that defendant had just purchased drugs at a house justified a traffic stop to confirm or dispel that suspicion.

Terry involved the suspicions of a veteran officer that the defendants' actions in repeatedly separately walking by a store, looking in the window, and returning to a street corner to confer, justified an inference that the defendants were "casing" the location to commit a crime. 392 U.S. at 5-6. Fearing that the men were armed and planning a robbery, the officer confronted them by grabbing one, patting down his overcoat, and uncovering a gun. He then did the same to the man's two companions, finding that one of them was similarly armed. Id. at 6-7.

The United States Supreme Court upheld both the seizure of the men and the patdown frisk. The court first determined that the observations of suspected criminal activity justified the officer's decision to stop the men. The government has a significant interest in detecting and preventing crime. Id. at 22. The frisk for weapons was also justified by the need to protect the officer. The court thought it unreasonable to deny an officer the power to take reasonable steps to determine if a suspect was armed. Id. at 24.

The court summed up its reasoning

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the officer, where he has reason to believe he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in his belief that this safety or that of others was in danger. * * * And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 27 [citations omitted].

Applying its new test, the court determined that it was reasonable to believe that men planning a daylight robbery would be

armed. Thus, the officer's action in frisking the men was reasonable. Id. at 28. The court reiterated that the "sole justification" of the frisk was to protect the officer and others nearby. Id. at 29.

Here, it was quite reasonable to believe that the hard object in the pocket, which the defendant did not want them to seize, may well have been a weapon.[2] The officers were at some point, as Sgt. McCabe testified, going to have to deal with the issue. It was appropriate to pull the object out in order to confirm or dispel the officers' suspicions. The search was limited to the object of their concern. It was only after the discovery of the drug pipe that a more thorough search turned up the two Altoids containers holding the methamphetamine. The pocket check was limited in scope and reasonable under Terry and its progeny.

There was an articulable suspicion justifying the seizure of the drug pipe. The trial court erred in ruling otherwise.

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[2] This case is quite easily distinguished from State v. Smith, supra. There the officers did not arrest the person they thought was the escapee. Instead, they approached him to see if they could identify him and then patted him down solely because of the area of town where the encounter took place. Id. at 452-453. The court found the patdown invalid: "This type of generalized suspicion is not sufficient to justify a frisk under *Terry*." Id. at 453. In this case, officers had a particularized suspicion about the hard object known to be in the pocket.

V.

CONCLUSION

For the reasons stated, the orders of suppression and dismissal should be reversed and the matter remanded for trial.

Respectfully submitted this 22nd day of February, 2006.

Kevin M. Korsmo #12934
Deputy Prosecuting Attorney

Attorney for Appellant

APPENDIX A

FILED
SEP 07 2005
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, vs. BEE X. XIONG, Defendant.	No. 05-1-00827-1 FINDINGS OF FACT, CONCLUSIONS OF LAW **(FNFCL)**

THIS MATTER having come before the Court on defendant's motion to suppress, the State represented by Mary Ann Brady, the defendant present and represented by Mark V. Hannibal. The Court having heard oral testimony of Special Agent Ramsey and Sergeant McCabe and the brief's and oral argument of counsel now makes the following:

FINDINGS OF FACT

1. The initial threshold is the criminal conduct of the defendant. What criminal conduct had the defendant undertaken that was articulable at that time other than the potential that he might be one who ultimately he was not.

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2. Although probable cause is generally required to perform a search and seizure under narrowly drawn and carefully circumscribed circumstances, lesser causes can suffice. An officer may frisk a person for weapons if the officer has reasonable grounds to believe the person is armed and dangerous.

3. The officer must be able to point to particular facts from which he reasonably inferred the individual was armed and dangerous. A generalized suspicion is insufficient to justify a frisk even when a person is present at a location the police are authorized to search by a valid warrant.

4. The stopping and cuffing of Bee Xiong and the detention of him at that time was appropriate.

5. Agent Ramsey testified that he wondered if the bulge felt in the right front pants pocket was a weapon and that he assumed it was. However, the Court was unable to find from the testimony any articulable facts specific and detailed or which the officer could reasonably infer the detained individual was armed and dangerous.

6. Mr. Bee Xiong was cuffed. The identification process should have taken place and although may have taken a little more time to confirm whether the detained person with the 'B' tattooed on his arm was in fact Bee Xiong and not Kheng Xiong, that once confirmed he was Bee Xiong, he would have been released uncuffed and not patted.

CONCLUSIONS OF LAW

Now Therefore, the Court having made the foregoing findings of fact, enters the following conclusions of law that under those specific facts and based upon the Agent's inability to articulate facts, specific and detailed, from which could be reasonably inferred this individual

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was armed and dangerous, the results of the frisk, which is the contraband, should be suppressed.

DATED this 7 day of September, 2005.

JEROME LEVEQUE
Superior Court Judge

JEROME J. LEVEQUE

Presented by:

MARK V. HANNIBAL, WSBA #16027
Attorney at Law

Approved as to form,
Notice of presentment waived:

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THE COURT: Thank you.

Officers in circumstances such as these are in difficult situations. I mean they are betwixt and between competing issues and concerns that places a lot of pressure and compressed in a very small period of time. We have probably been arguing this longer than the event took place. I mean, we have probably spent as much time talking about it as the officer had to make a decision, you know, the decision is made almost like that (gesturing) and we have we have this time to look back at that time (gesturing) and that's -- I'm acutely aware of that.

Referencing the State v. Gelbert (ph) case and I am mindful of the initial -- the threshold issue of, you know, what is the criminal conduct here. I mean, frankly, there was no criminal conduct by this particular person that was articulable at that time other than the potential that he may be one who ultimately he was not. The someone is the person they were looking for, his brother.

But that doesn't mean he was involved in any criminal conduct and it reads the case St.

v. Gelbert although probable cause is generally required to perform a search and seizure under narrowly drawn and carefully circumscribed

circumstances, lesser causes suffice. An Officer may frisk a person for weapons if the officer has reasonable grounds to believe the person is armed and dangerous.

The officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. A generalized suspicion is insufficient to justify a frisk even when a person is present at a location the police are authorized to search by a valid warrant.

Now this a little bit different because we have the identify issue infused in here as we -- we don't just have somebody in the area. We have somebody who a casual in the dark observance would be somewhat very similar to the person who was sub ject to a warrant.

The stopping and cuffing of Bee Xiong (ph) and the retaining at that time, detention and cuffing I think was appropriate.

And I have again the benefit of good lighting and time to take a good look at the

photograph of Kaing Xiong (ph)as well as this Defendant Bee Xiong. And I certainly can see differences in the two. It is easier for me to do so, I am not in the dark, I am not at the scene.

But that is not to the detriment either of this Defendant who did tell the truth and I believe that in many, if not most, instances a

person about to be searched for a weapon, if they have other contraband on them, is gonna be pretty skitty (ph) about being searched even though there is no weapon. It would be in my mind a natural reaction of someone who is in possession of contraband when they are grabbing it or touching it or feeling it, doesn't want that to happen. They're, I guess -- here I am.

There was testimony from Officer -- Special Agent Ramsey that I wrote down: I wondered if -- in reference to a weapon, I assumed. The -- I don't think there's any doubt that the officer was wondering if that was a weapon, but I don't have articulable facts specific and detailed indicating that there was someone at the scene, an officer who was able to point to particular facts which he

reasonably inferred that the individual was armed and dangerous.

The person was cuffed. I believe the i.d. process should have taken place and could have taken place. It may have taken a little bit more time to confirm whether the man with the B tattooed on his arm was in fact Bee Xiong or not and I'm also convinced that once confirmed it was not Kaing Xiong that he would have been released uncuffed and not patted.

Under those circumstances, I do not believe the results of that frisk, which is the contraband, is appropriate to be used and

should be suppressed. I'll sign the order.